



State of Arizona
Office
of the
Auditor General

PERFORMANCE AUDIT

**ARIZONA
AIR POLLUTION
CONTROL
HEARING BOARD**

**Report to the Arizona Legislature
By Douglas R. Norton
Auditor General**

**February 1999
Report Number 99-2**



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AUDITOR GENERAL

STATE OF ARIZONA
OFFICE OF THE
AUDITOR GENERAL

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February 11, 1999

Members of the Arizona Legislature

The Honorable Jane Dee Hull, Governor

Mr. Robert Dunstan, Chairman
Arizona Air Pollution Control Hearing Board

Transmitted herewith is a report of the Auditor General, A Performance Audit of the Arizona Air Pollution Control Hearing Board. This report is in response to a May 27, 1997, resolution of the Joint Legislative Audit Committee. The performance audit was conducted as part of the Sunset review set forth in A.R.S. §§41-2951 through 41-2957.

This report addresses the 12 Sunset Factors which the Legislature is to consider in determining whether to continue or terminate the Air Pollution Control Hearing Board (Board). This review determined that no significant harm to the public would likely result if the Board were terminated. However, the Board does provide an independent appeal opportunity that is less costly to the taxpayers and more accessible than appeal through Superior Court. The Legislature should consider the following changes to the Board's statutes: 1) enact a statutory requirement to again stagger the terms of the Board members as originally intended; 2) amend A.R.S. §49-423 to specify the level of expertise required for membership on the Board; 3) provide the Board's administrative support from an agency other than ADEQ to increase the Board's appearance of independence; and 4) repeal or amend Laws 1990, Chapter 42 §1, which contains a statement of the Board's purpose that does not reflect the Board's statutory duties

As outlined in its response, the Board agrees with all of the findings and recommendations.

My staff and I will be pleased to discuss or clarify items in the report.

This report will be released to the public on February 12, 1999.

Sincerely,

Douglas R. Norton
Auditor General

Enclosure

SUMMARY

The Office of the Auditor General has conducted a performance audit and Sunset review of the Arizona Air Pollution Control Hearing Board, pursuant to a May 27, 1997, resolution of the Joint Legislative Audit Committee. This review is part of the Sunset review set forth in Arizona Revised Statutes (A.R.S.) §§41-2951 through 41-2957.

Pursuant to A.R.S. §49-428, the Air Pollution Control Hearing Board (Board) is responsible for hearing appeals of Arizona Department of Environmental Quality (ADEQ) decisions regarding air quality permits and related matters. The Board has the authority to sustain, modify, or reverse ADEQ's decisions. The Board consists of five Governor-appointed members who serve three-year terms.

This report discusses the 12 factors which, under A.R.S. §41-2954, the Legislature is to consider in determining whether to continue or terminate the Board. The review determined that although no significant harm to the public would likely result if the Board were terminated, the Board does provide an appeal opportunity that (1) is less costly to taxpayers and more accessible than appeal through Superior Court and (2) is unlike other ADEQ appeal processes, for which the ADEQ director has final authority. This review recommends that the Legislature make the following changes if it decides to continue the Board:

- Enact a statutory requirement to vary the terms of the next Board appointments, and by so doing, again stagger the Board members' terms as originally intended. Currently, all five Board member positions are filled and their terms expire in January 1999, as a result of replacement members being appointed to new terms rather than completing their predecessors' terms.
- Amend A.R.S. §49-423 to specify the level of expertise required for membership on the Air Pollution Control Hearing Board. Current Board members are required to be "knowledgeable" regarding air pollution; however, "knowledgeable" does not define a specific level of expertise. Other appeals boards' statutes specify the education and work experience required for board membership;
- Provide the Board's administrative support from an agency other than ADEQ to increase the Board's appearance of independence. Other boards that hear ADEQ appeals receive their administrative support from the Department of Administration and the Office of Administrative Hearings; and
- Repeal or amend Laws 1990, Chapter 42 §1, which contains a statement of the Board's purpose that does not reflect the Board's statutory duties.

This review also recommends that the Board take steps to ensure that its files contain hearing advertisements, documentation of appeal outcomes, and if available, court reporters' transcripts of hearings.

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INTRODUCTION AND BACKGROUND

The Office of the Auditor General has conducted a performance audit and Sunset review of the Air Pollution Control Hearing Board, pursuant to a May 27, 1997, resolution of the Joint Legislative Audit Committee. This review is part of the Sunset review set forth in Arizona Revised Statutes (A.R.S.) §§41-2951 through 41-2957.

Board's Role and Responsibilities

The Air Pollution Control Hearing Board's (Board) role in air pollution regulation has changed significantly since its inception. The Board's early responsibilities included the following:

- Determining whether a violation of air quality rules and regulations had occurred and, if so, issuing the subsequent order of abatement;¹
- Issuing and determining terms for conditional permits, which are permits that allow variations from rules and regulations; and
- Hearing appeals of air pollution control permit decisions that specify pollution control technologies and monitoring requirements for air pollution sources.

Over time, statutory changes shifted the authority for issuing orders of abatement and conditional permits to the Arizona Department of Environmental Quality (ADEQ). The Board's statutory authority is now limited to hearing appeals of ADEQ decisions in all three areas—abatement orders, conditional orders (formerly permits), and air pollution control permits.

In addition, state statute delegates some air pollution regulatory authority to counties with air pollution control districts, further limiting the Board's influence. Maricopa, Pima, and Pinal Counties have air pollution control programs with Hearing Boards almost identical to the State Air Pollution Control Hearing Board. As a result, the State Board's functions are limited to the remaining 12 Arizona counties and the specific sources over which ADEQ retains sole jurisdiction, or reasserts jurisdiction.²

¹ An order of abatement is a legal notice sent to someone who violates air pollution regulations. It includes the specifics of the violation and may require a person to refrain from particular acts.

² The State retains sole jurisdiction over metal ore smelting, petroleum refineries, coal-fired electrical generating plants, certain cement plants, mobile sources, and some portable sources.

In the past 5 years, 12 appeals, regarding 10 ADEQ permit decisions that were filed with the Board, were resolved. Eight of the 10 cases were settled before being heard by the Board. The Board did not meet in 1996 or 1997.

Board Membership and Administration

The Board consists of five members, appointed by the Governor for three-year terms. All five Board members are required by statute to be “knowledgeable in the field of air pollution.” In 1980, the Legislature added a requirement that at least three members must not “*have a substantial interest . . . in any person required to obtain a permit . . .*” In 1990, the Legislature added requirements for one member to be a licensed attorney and for one member to be a registered engineer. Members are paid \$30 per meeting day, plus expenses.

Board expenses are normally minimal since the Board is not required to meet for any purpose other than a hearing. Board members’ compensation and expenses are paid from the ADEQ Air Permits Administration Fund. Because the Board did not meet in 1996 or 1997, ADEQ records show no Board expenses for those years. The salary and related expenses of the Board’s clerk, who performs administrative work on appeals whether they are heard by the Board or not, is paid from ADEQ’s General Fund. The clerk is the ADEQ Hearings Administrator who manages all ADEQ appeals.

Audit Scope and Methodology

The purpose of this review was to assess the Board’s performance in accordance with the 12 Sunset Factors set forth in A.R.S. §41-2954. The review determined there would be no significant harm to the public if the Board were terminated. However, the Board does provide the opportunity for administrative appeal of ADEQ air pollution control decisions. Further, [Sunset Factor 10](#) (see pages 9 through 10), which addresses possible termination of the Board, explains that the Board has statutory authority to make a decision independent of the ADEQ director, unlike most other ADEQ appeals processes.

In addition, [Sunset Factor 9](#) (see pages 8 through 9) addresses needed statutory changes, and recommends that the Legislature consider the following:

- Enact a statutory requirement to vary the terms of the next Board appointments, and by so doing, again stagger the Board members’ terms as originally intended;
- Amend A.R.S. §49-423 to specify the level of expertise required for membership on the Air Pollution Control Hearing Board;

- Provide the Board’s administrative support from an agency other than ADEQ to increase the Board’s appearance of independence; and
- Repeal or amend the Board’s purpose, as it was stated in 1990 Session Law, to more accurately reflect the Board’s current statutory authority.

Further, [Sunset Factor 5](#) (see page 7), addresses the extent to which the Board informs the public of its actions, and recommends that the Board take steps to ensure that its files contain hearing advertisements, documentation of hearing outcomes, and if available, court reporters’ transcripts of hearings.

Audit work focused on determining the Board’s role in the air pollution regulatory process and the adequacy of Board membership requirements. Research for these issues included review and analysis of Board statutes and rules, Environmental Protection Agency regulations, State and County Air Pollution Control statutes, Office of Administrative Hearing statutes, ADEQ environmental program appeal statutes, and the 12 appeals resolved between 1993 and 1998 regarding 10 ADEQ permit decisions. Audit staff also interviewed Board members, ADEQ officials, an Assistant Attorney General, appellants from the majority of Board appeals for the past five years, and officials from County Air Pollution Programs, the Governor’s Office, the Department of Administration, and the Office of Administrative Hearings.

This audit was conducted in accordance with government auditing standards.

The Auditor General and staff express appreciation to the members of the Air Pollution Control Hearing Board for their cooperation and assistance throughout the audit.

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SUNSET FACTORS

In accordance with A.R.S. §41-2954, the Legislature should consider the following 12 factors in determining whether to continue or terminate the Air Pollution Control Hearing Board (Board).

1. **Objective and purpose in establishing the Board.**

The Air Pollution Control Hearing Board was created by Laws 1967, Chapter 2 §9, now A.R.S. §49-423. Originally, as part of the Department of Health's Division of Air Pollution Control, the Board functioned as part of the air pollution regulatory process. Statutory changes have since limited the Board's function to only hearing appeals. First, Laws 1970, Chapter 164, §35 terminated the Board's authority to issue orders of abatement, which notify permit holders of violations and may require them to discontinue certain practices. Second, Laws 1992, Chapter 299, §24 eliminated the Board's authority to issue conditional permits, which allow permit holders variations from rules and regulations.

Currently, pursuant to A.R.S. §49-428, the Board is responsible for hearing appeals of the Arizona Department of Environmental Quality's (ADEQ) decisions on air pollution permits, abatement orders, and conditional orders. Appeals can be made by permit applicants or any person who filed a comment on the permit. The Board has the authority to sustain, modify, or reverse the ADEQ decision. Following the Board's decision, appellants may further appeal their cases to Superior Court.

While the Board's statutory authority is now limited to only hearing appeals, the Board's purpose statement established in 1990 session law does not reflect those changes. Laws 1990, Chapter 42, §1 provides:

The purpose of the air pollution control hearing board is to preserve, protect and improve the air resources of this state. This purpose is achieved through the prevention and abatement of air pollution, the monitoring of air pollution and the issuance and monitoring of air quality permits.

Regardless of the purpose statement, the Board does not have the authority to prevent or abate air pollution, monitor air pollution, or issue and monitor air quality permits. The Legislature should repeal or clarify the purpose statement to more accurately reflect the statutory changes in the Board's authority.

2. The effectiveness with which the Board has met its objectives and purposes and the efficiency with which the Board has operated.

The Board has met its statutory objective to hear appeals of ADEQ permit actions. In the past five years, 12 appeals regarding 10 different permit decisions were filed with the Board.¹ Eight of those cases were resolved before the scheduled Board hearing took place. For the two cases that were heard, one Board decision was overturned in Superior Court, while the parties agreed to the Board's final decision in the other. The Board considers itself to be effective at encouraging informal dispute resolution because most cases are settled prior to a hearing. In all eight cases that were settled, the Board had granted at least one continuance to the appellants, allowing an opportunity for negotiation and settlement.

However, delays in gubernatorial appointments have resulted in vacancies on the Board, which could affect the Board's effectiveness. For example, after one member's death in 1994, 13 months passed before the Governor appointed a replacement. One attorney for an appellant objected to a four-member Board, arguing that a 2-2 decision would "confound rather than facilitate the administrative process."

3. The extent to which the Board has operated within the public interest.

The Board has operated in the public interest by providing the public and the regulated community an opportunity to resolve disputes with ADEQ in a setting that is less formal and less costly to taxpayers than Superior Court.

4. The extent to which rules adopted by the Board are consistent with the legislative mandate.

In August 1998, the Board completed a review of its rules pursuant to A.R.S. §41-1056 and the Governor's Regulatory Review Council's 5-year rule review schedule. This review found that some of its rules are duplicative of, or are in conflict with, the time frames contained in statute. For example, R18-3-104 requires a notice of appeal to be filed within 10 days after the Director's action. This conflicts with A.R.S. §49-428, which provides 30 days.

Further, the review found that the Board's authority to promulgate rules is unclear. The Attorney General's Office and the Governor's Regulatory Review Council advised the Board to seek legislative clarification. The Board indicates it will seek clarification and legislative direction concerning its authority to prom-

¹ Since 1995, 12 appeals filed with the Board have been resolved. Three of those appeals related to the same ADEQ decision.

ulgate rules during the next legislative session. After clarification, the Board indicates it will update its rules.

- 5. The extent to which the Board has encouraged input from the public before promulgating its rules and regulations and the extent to which it has informed the public as to its actions and their expected impact on the public.**

The Board is in compliance with Open Meeting Law requirements. The Board has filed a notification statement with the Secretary of State and meeting notices have been posted in the proper location at least 24 hours before Board meetings. Further, A.R.S. §49-444 requires the Board to advertise its hearings at least twice in a newspaper of general circulation in the county concerned. The Board appears to be in compliance with statutory requirements to advertise its meetings, but documentation of that advertising was found in ADEQ files, rather than in the Board's files. The Board should document the newspaper advertisements of its hearings in its files.

The Board should also take additional steps to ensure that the public can be knowledgeable about its decisions. First, the Board should document the final outcome of appeals, since some files lacked that documentation. Second, although the Board files contain tape recordings of the Board hearings, the Board should ensure that if court reporters' transcripts of hearings are available, they be kept in its files as well.

- 6. The extent to which the Board has been able to investigate and resolve complaints within its jurisdiction.**

This factor does not apply, as the Board does not have investigative or regulatory authority.

- 7. The extent to which the Attorney General or any other applicable agency of state government has the authority to prosecute actions under enabling legislation.**

This factor is not applicable to the Board.

- 8. The extent to which the Board has addressed deficiencies in the enabling statutes which prevent it from fulfilling its statutory mandate.**

As discussed in Sunset Factor 4 (see pages 6 through 7), in its 5-year Governor's Regulatory Review Council rules review, the Board identified the need to clarify

its rule-making authority in order to address deficiencies in its current rules. The Board intends to seek clarification in the upcoming legislative session.

9. The extent to which changes are necessary in the laws of the Board to adequately comply with the factors listed in the Sunset review statute.

Several statutory changes are necessary in the laws of the Board to adequately comply with the factors listed in the Sunset review statute.

- **Staggering terms**—The Legislature should require that Board members' terms be staggered as originally intended. The original statute required that the initial Board members be appointed to staggered terms, which should have remained staggered even after the original statutory language was removed. Terms became concurrent as replacement members were appointed to new three-year terms rather than completing their predecessors' terms. Currently, all five Board members' terms expire on January 18, 1999. Several Board members' terms expiring at once could make it difficult for the Governor's Office to maintain a fully staffed Board and potentially rob the Board of continuity. The Legislature should enact a statutory requirement to vary the terms of the next Board appointments, and by so doing, again stagger the terms.

In addition, the Board believes it would be beneficial to increase Board member terms from three to five years to allow time for members to develop experience with the administrative process.

- **Specifying qualifications for Board membership**—A.R.S. §49-423(B) should be amended to specifically define the Board's membership requirements. A.R.S. §49-423(B) requires that Board members be "knowledgeable in the field of air pollution;" however, "knowledgeable" does not indicate the degree of knowledge a Board member must possess. Consequently, Board members could qualify with minimal knowledge in air pollution issues. A review of appeals files and interviews of appellants indicate that appellants desire expertise on the Board. The appellants indicated that air pollution expertise was essential to ensure that Board members were able to make decisions independent of ADEQ.

Other appeals boards that perform similar functions have more specific membership requirements than this Board. For example, members of the newly created Underground Storage Tank Technical Appeals Panel are required to have a college degree as well as professional experience in engineering, hydrology, geology, or hydrogeology. Experience with underground

storage tank corrective actions is highly preferred but not required. Further, A.R.S. §42-171 requires State Board of Tax Appeals Division One members to “be selected on the basis of their education or work experience” in fields such as property valuation, accounting, and economics.

In addition, the Board recommends that an additional engineer member be added to the current requirement that one Board member be an attorney and one member be a registered engineer. The Board suggests that this additional engineer position need not be registered if the person is a faculty member in engineering or science at an Arizona University. The Board also suggests the registered engineer be an environmental or civil engineer.

- **Changing the source of administrative support**—The Board’s appearance of independence from ADEQ could be increased by relocating it to another agency. The Board receives its administrative support from ADEQ, but also determines the appropriateness of ADEQ decisions. Similar ADEQ appeals boards receive their administrative support from other agencies. For example, the Water Quality Appeals Board is supported by the Department of Administration, and the Underground Storage Tank Technical Appeals Panel was created within the Office of Administrative Hearings.

Finally, as stated in Sunset Factor 1 (see page 5), the Board’s statutory purpose, outlined in Laws 1990, Chapter 42, §1, should be either repealed or clarified to accurately reflect the Board’s statutory authority.

10. The extent to which the termination of the Board would significantly harm the public health, safety or welfare.

Termination of the Board would not cause significant harm to the public health, safety, or welfare. However, the Board does provide an administrative appeal function for air quality permit actions. If terminated, however, there could be an increase in Superior Court appeals and public expense.

If the Board were terminated, its function could be transferred to the Office of Administrative Hearings (OAH). OAH provides a similar administrative appeal function for other ADEQ programs. For example, pursuant to A.R.S. §49-785, OAH hears appeals of ADEQ actions regarding solid waste facility operations.

However, there are significant differences in the decision-making authority of OAH and the Board. OAH can only make recommendations to the ADEQ director, who may accept, reject, or modify the administrative law judge’s recommendations. In contrast, the Air Pollution Control Hearing Board has the authority to sustain, modify, or reverse ADEQ decisions pursuant to A.R.S. §49-428.

Additionally, the Board believes it provides two advantages over OAH. First, the Board feels it provides comprehensive expertise in air pollution issues that OAH would not. Second, the Board emphasizes that it provides the public with a five-member decision-making body, rather than a single administrative law judge as provided by OAH.

- 11. The extent to which the level of regulation exercised by the agency is appropriate and whether less or more stringent levels of regulation would be appropriate.**

Since the Board is not a regulatory body, this factor does not apply.

- 12. The extent to which the Board has used private contractors in the performance of its duties and how effective use of private contractors could be accomplished.**

The Board's specific responsibilities limit its use of private contractors. However, the Board has used private contractors for its 5-year rule review and to produce transcripts of its hearings. These expenses have been paid from the ADEQ Air Permits Administration Fund.

Agency Response

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CONFIDENTIAL

AIR POLLUTION CONTROL HEARING BOARD

3033 N. Central Avenue, Room 822

Phoenix, AZ 85012

February 4, 1999

Douglas R. Norton, CPA
Auditor General
2910 North 44th Street, Suite 410
Phoenix, Arizona 85018

Re: Air Pollution Control Hearing Board Sunset Review-Final Response

Dear Mr. Norton:

Thank you for providing the Board with a second revised draft of the Performance Audit of the Arizona Air Pollution Control Hearing Board. As you know from my correspondence of January 28, 1999, at a meeting of the Board held on January 27, 1999, the full Board considered your report and made comments. We appreciate your taking the Board's comments into consideration in this final draft.

Based on the final report clarifications, and the vote taken at the Board's last meeting, I reiterate that with regards to your recommendations that the Board should document the newspaper advertisements of its hearings in its files and that the Board should document the final outcome of all appeals, the findings of the Auditor General are agreed to and the audit recommendations will be implemented.

Also, with regard to your recommendation that the Board should ensure that court reporters' transcripts of hearings are kept in its files, the finding of the Auditor General is also agreed to. Specifically, the meetings of all Board meetings are taped and kept in the file. Also, if transcripts are made available, the Board will place a copy in its file.

Board members again wish to show their appreciation for your professionalism in this endeavor. We look forward to receiving a copy of the final report as soon as it is complete.

Sincerely,

Robert O. Dunstan
Chairman
Arizona Air Pollution Control
Hearing Board